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No. 90-1114

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, FEDERAL KEMPER LIFE ASSURANCE COMPANY

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY CERTIORARI JURISDICTION TO ADDRESS ISSUES WHICH WERE NOT RAISED OR PASSED UPON BELOW?

II.

WHERE THIS COURT AND ALL ELEVEN CIRCUIT COURTS HAVE RECOGNIZED THE VALIDITY OF REMITTITURS UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IS THERE ANY VALID ISSUE PRESENTED FOR REVIEW?

III.

SHOULD THIS COURT EXERCISE ITS DISCRETIONARY CERTIORARI JURISDICTION TO REVIEW THE ATTACK UPON THE VALIDITY OF THE REMITTITUR IN THIS CASE WHERE THE FACTUAL BASIS FOR THE REMITTITUR IS CLEARLY STATED IN THE OPINION AND SUPPORTED BY THE RECORD?

PARENTS AND AFFILIATES OF KEMPER

Respondent, Federal Kemper Life Assurance Company is part of and affiliated with Kemper Group Financial Companies which includes the following companies for purposes of Supreme Court of the United States Rule 29.1:

Lumbermans Mutual Casualty Company
Kemper Corporation
Kemper Financial Companies, Incorporated
Financial Services, Inc.
Stewart-Jennings, Incorporated
Investors Brokerage Services, Inc.
Investors Fiduciary Trust Company
Kemper Investment Management Company
(Limited England)
Kemper-Murray Johnstone International, Incorporated
Kemper Sales Company
Kemper Asset Management Company
Kemper/Cymrot, Incorporated
Kemper/Cymrot Management, Incorporated
SFA Holding Company, Ltd.
Mortgage Funding Corporation
Safe Corporation
SAF Insurance Corporation of Delaware
Kemper Investors Life Insurance Company
KILICO Realty Corporation
Galaxy Offshore, Incorporated
Loewi Financial Companies, Incorporated
Blunt Ellis & Loewi Incorporated
Loewi Advisory Services, Incorporated
Loewi Management Corporation
Beta Systems, Incorporated
B.E.L. Capital Corporation
Loewi Managed Accounts Services, Incorporated
Municipal Funding, Incorporated
Peers Holdings, Incorporated
Peers & Company
PH II, Incorporated
Peers Capital Corporation
Prescott Holdings, Incorporated
Prescott, Ball & Turben, Incorporated
Greystone Mortgage Group, Incorporated
Prescott Capital Markets, Incorporated
Carnegie Administration Corporation

BJVC Emergency Management Corporation
BJVC Real Estate Corporation
Selected Financial Services, Incorporated
Prescott Travel, Incorporated
Prescott Lease Services, Incorporated
Prescott Realty Services, Incorporated
1331 Advisers, Incorporated
PMB Corporation
Carnegie Capital Management Company
Carnegie Fund Distributors, Incorporated
Batehill, Incorporated
BEHRLEASCO, Incorporated
Batehill Leasing Corporation
Bateman Eichler, Hill Richards Realty Services, Incorporated
Bateman Eichler, Hill Richards Housing Investors, Incorporated
Bateman Eichler, Hill Richards Realty Company, Incorporated
Intercapital Group
BEHR Futures Management Corporation
BEHR Technology Management Corporation
BEHR Venture Management Corporation
Bateman Eichler, Hill Richard Overseas, B.V. (Netherlands)
Bateman Eichler, Hill Richards, Inc.,
Boettcher Investment Corporation
Boettcher & Company, Incorporated
Boettcher Insurance Agency
Boettcher Insurance, Incorporated
Forecaster Company
BPL Holdings, Incorporated
Case Management, Incorporated
MWG Holdings, Incorporated
Lovett Mitchell Webb & Garrison, Incorporated
Gulf Texas Investment Corporation
Federal Street Equities, Incorporated
Federal Street Managers, Incorporated
Dove Associates, Incorporated
Gulfstream Management, Incorporated
Gulfstream Financial Associates, Incorporated
International Business Management, Incorporated
Kemper Capital Markets, Incorporated
Ose, Sample, Lynch & Company
Kemper Clearing Corporation
Investors Fiduciary Corporation
Kemper Currency, Incorporated

Kemper Real Estate, Incorporated
Kemper Service Company
American Motorists Insurance Company

American Protection Insurance Company
AMICO Realty Corporation
BBC Associates, Incorporated
KAA1 PGA Sales, Incorporated
American Underwriting Corporation
Associated Mutuals, Incorporated
Central Mortgage Company
Kemper Realty Corporation
Kemper International Corporation
Kemper Management Company, Ltd. (Bermuda)
Kemper Insurance Company Limited (Australia)
Kemper, S. A. (Belgium)
Kemper Conservation Industrielle, S.A. (Belgium)
Kemper International Insurance Company (PET) (Limited Singapore)
The Seven Continents Insurance Company Limited (Bermuda)
American Manufacturers Mutual Insurance Company
Fidelity Life Association
Florida Realty Corporation
Kemper Lloyds Insurance Company
The James S. Kemper Foundation
Kemper Corporation
Federal Kemper Insurance Company
Mound Agency, Incorporated
Mound Agency of W. Virginia, Inc.
FKLA Realty Corporation
Galaxy Offshore, Incorporated
Kemper Reinsurance Company
Kemper Reinsurance (Bermuda) Limited
Kemper Europe Reassurances, S. A. (Belgium)
Kersa Holding Company, Luxembourg
Kemper Reinsurance London, Ltd.
American Insurance Agency Pty. Ltd. (Australia Dormant)
Economy Fire & Casualty Company
Economy Preferred Insurance Company
Economy Premier Assurance Company
Premier Assurance Center, Incorporated
National Loss Control Service Corporation
National Loss Control Service Corporation (Canada) Ltd.
Kemperco, Incorporated (Ill. Dormant)

Kemper/Bedford Properties, Incorporated
Kaiser Development Company
Kaiser Hawaii Kai Development Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES vii
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 5
REASONS WHY THE PETITION SHOULD BE DENIED 6

I.

THE ISSUES SOUGHT TO BE RAISED HAVE BEEN WAIVED BY FAILURE TO PRESENT THEM IN THE LOWER COURTS 6

II.

THE PETITION IN THIS CASE PRESENTS NO CREDIBLE CLAIM THAT THE GRANTING OF A REMITTITUR VIOLATES THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL OR DENIES THE EQUAL PROTECTION OF THE LAW 7

III.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF ABUSE OF DISCRETION AND FULLY AND ADEQUATELY EXPLAINED THE REASON FOR THE REMITTITUR 11

CONCLUSION 16

TABLE OF AUTHORITIES

CASES: Page

Brown v. Cadillac Motor Division,
468 So.2d 903 (Fla. 1985) 2, 13, 14

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,
492 U.S. _____, 106 L. Ed 2d 219, 109 S.Ct. 2909 (1989) 6, 7

Champion v. Gray,
478 So.2d 17 (Fla. 1985) 2, 13, 14

Dagnello v. Long Island Railroad Co.,
289 F.2d 797 (2nd Cir. 1961) 8, 10

Dimick v. Schiedt.
293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296 (1935) 10

Donovan v. Penn Shipping Co.,
429 U.S. 648, 51 L.Ed 2d 112, 97 S.Ct. 835 (1977) 11

Duignan v. United States,
274 U.S. 195, 71 L.Ed 996, 47 S.Ct. 566 (1926) 6

Erie Railroad Co. v. Thompkins,
304 U.S. 64, 82 L.Ed 1188, 58 S.Ct. 817 (1938) 2

Evers v. Equifax, Inc.,
650 F.2d 793 (5th Cir. 1981) 7

Glazer v. Glazer,
278 F.Supp. 476 (E.D. La. 1968) 8, 12

Goldstein v. Manhattan Industries,
758 F.2d 1435 (11th Cir. 1985), cert. denied, 474 U.S. 1005, 88 L.Ed 2d 457, 106 S.Ct. 525 (1985) 7

Gorsalitz v. Olin Mathieson Chemical Corporation,
429 F.2d 1033 (5th Cir. 1970) 8, 12

Gruenthal v. Long Island Railroad Co.,
393 U.S. 156, 21 L.Ed. 2d 309, 89 S.Ct. 331 (1968).... 7

Life Insurance Company of Georgia v. Lopez,
443 So.2d 947 (Fla. 1983) 2

NLRB v. Hendricks City Rural Electric Membership Corp.,
454 U.S. 170, 70 L.Ed 2d 323, 102 S.Ct. 216 (1981) ... 15

Sguros v. Biscayne Recreational Development Co.,
528 So.2d 376 (Fla. 3rd DCA 1987) 2, 14

United States v. Johnston,
268 U.S. 220, 69 L.Ed 925, 45 S.Ct. 96 (1925) 15

United States v. Ortiz,
422 U.S. 891, 45 L.Ed 2d 623, 95 S.Ct. 2585 (1975) ... 6

Westbrook v. General Tire and Rubber Co.,
754 F.2d 1233 (5th Cir. 1985) 7

MISCELLANEOUS:

6A Moore's Federal Practice, 2 ed., § 58 [7], p. 59-189
n. 10 8

6A Moore's Federal Practice, 2 ed., § 59.15 [1],
p. 59-294 11

2 Fed. Proc. L. Ed. Sec. 3:616 11

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, FEDERAL KEMPER LIFE ASSURANCE COMPANY

Respondent, Federal Kemper Life Assurance Company, respectfully presents its Brief in Opposition to the Petition For Writ of Certiorari filed by Edmund J. Bodine, Jr.[1]

STATEMENT OF THE CASE

Bodine's Statement of the Case is inaccurate in its primary contention regarding the Eleventh Circuit's basis for ordering a remittitur in this case, and otherwise requires supplementation.

In stating that Kemper did not present any expert witnesses

1/ The parties as follows will be referred to as "Kemper" and "Bodine." (A. _____) references the appendix to the Petition. (RA. _____) references the appendix to this Brief in Opposition.

with respect to psychic injury, Bodine fails to inform the Court of the procedural history of the case. On January 23, 1989, the Honorable Elizabeth A. Kovachevich, the District Judge originally assigned to the case, entered a Partial Summary Judgment in favor of Kemper. (RA. 1-9). That Order clearly and unambiguously dispensed with all liability claims and theories except the issue of *negligence* under the claim predicated upon *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983). (RA. 1-6). The Order then addressed the various damage claims and granted summary judgment on the claim for punitive damages, intentional infliction of emotional distress, (RA. 7-9) *and* "... as to any claim for negligent infliction of emotional damages." (RA. 7-9).

The case was then assigned to the Honorable Clarence C. Newcomer, Visiting Judge, for trial. Judge Newcomer, on the first day of trial on March 5, 1989, addressing a motion in limine on Bodine's attempt to revive emotional distress damages, revisited the prior summary judgment and reinstated the claim for negligent infliction of emotional damages. The subsequent Memorandum held that emotional distress damages were recoverable under a *Lopez* claim, even in the absence of any impact. (RA. 10-15).

This revisiting of the prior Order was affirmed by the United States Court of Appeals for the Eleventh Circuit. (A. 3-4).[2]

2/ In so doing, the Eleventh Circuit, in violation of *Erie Railroad Co. v. Thompkins,* 304 U.S. 64, 82 L.Ed 1188, 58 S.Ct. 817 (1938), refused to apply Florida's unambiguous "impact doctrine" under which damages for purely psychic injury to a plaintiff placed in fear of his own life are barred absent actual impact. Rather, the Court applied the limited relaxation of the requirement of impact which is applicable only to emotional distress over death or injury to one *other than the Plaintiff. Champion v. Gray,* 478 So.2d 17 (Fla. 1985); *Sguros v. Biscayne Recreational Development Co.,* 528 So.2d 376 (Fla. 3rd DCA 1987), pet. denied 525 So.2d 880 (Fla. 1988). The Eleventh Circuit then ignored Florida's clearly defined "objectively discernible physical impairment" standard which, under the inapplicable modification applied by the Court, is an indispensable element of any action for psychic injuries based on simple negligence. *Brown v. Cadillac Motor Division,* 468 So.2d 903 (Fla. 1985). Kemper has filed its separate Petition for Writ of Certiorari, *Kemper Life Assurance Company v. Bodine,* Case No. 90-980, to review this open violation of *Erie.*

Although erroneously affirming the judgment with respect to the recovery of emotional distress damages, the Eleventh Circuit granted a remittitur of $1,000,000 of the $2,000,000 awarded by the Jury. (A. 9). In so doing, contrary to Bodine's assertion, the Eleventh Circuit explained the factual basis upon which remittitur was granted by accepting Kemper's position, supported by the record, that:

> ...the insurance policy was actually cancelled on December 8, 1983, approximately one month after Kemper received notice of the murder plot, and that Bodine was aware that the policy had been cancelled by February 28, 1984. Kemper also argues that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy. (Footnote Omitted). (A. 9).

The Court noted its careful review of the Record "in this regard" in ordering the remittitur. (A. 9).

As Bodine's Petition admits, pp. 2-3, Dr. Sprehe testified that Bodine's emotional stress was the result of the death threat *and* the delay in cancelling the policy. The record reveals that much of his emotional distress was the result of the separate death threat for which Kemper was not responsible. The evidence showed that after November 11, 1983, when Kemper's personnel obtained some verification from the Federal authorities that there was a death threat, less than one month expired before Kemper cancelled the policy on December 8, 1983 removing the alleged motive under *Lopez*. (A. 3). As the Eleventh Circuit's opinion notes, Bodine's Attorney, who requested the cancellation, was immediately notified of the cancellation. (A. 3, 9 n. 9).

Bodine suffered no "impact," much less *any* physical injury as the result of any negligence by Kemper. The assassin allegedly hired by William Stroup, the beneficiary, was apprehended in November 1983 and tried and convicted in February of 1984. Stroup was not apprehended until March, 1984, and was subsequently acquitted of any criminal charges.

Bodine did not consult any physician until January 27, 1987, some *four years* after the cancellation and a year after the filing of the original complaint in December, 1985. Bodine did not give Dr. Sprehe any history of *any* physical illness. Dr. Sprehe testified only that Bodine had a mixed anxiety depression, paranoid disorder, and referred to Bodine "...sweating profusely, crying and shouting" in front of him.

Even before Kemper was notified that its policy might be the motive for the murder plot, there was evidence that Bodine thought that the government's investigation was an "abscam" operation directed at his Cayman Islands business.

For the first time on cross-examination, after over-hearing a bench conference at which the District Court questioned the evidence of physical impairment, Bodine volunteered one instance of allegedly "throwing up" on November 7, 1983 when he visited Yordan and Kemper was called and was requested to cancel the policy. This event was prior to Kemper's November 11, 1983 confirmation that there was a murder plot. Bodine testified to only one other "panic reaction" which he experienced when he was read a letter of December 2, 1983 from Kemper stating that they needed the permission of the owner of the policy to cancel the policy.

Although Bodine had been cautioned by the government not to speak to anyone, he disobeyed those instructions and contacted Stroup. Later, when his parents read him the December 2, 1983 letter, the government had just told him that Stroup was the primary suspect.

Kemper's timely filed post-trial motions for a new trial and remittitur were denied by the District Court. Following affirmance and granting of the remittitur by the Eleventh Circuit, Kemper's Petition for Rehearing and separate Request for Certification of Dispositive Issues of Law to the Supreme Court of Florida were denied on November 15, 1990. (A. 12, 14).

At no time, either in the District Court or in the Eleventh Circuit, did Bodine assert any constitutional objections to the power to grant a remittitur as evidenced by the excerpts from his Brief in the Eleventh Circuit directed to the remittitur issue. (RA. 16). Neither did Bodine seek rehearing in the Eleventh Circuit to question the sufficiency of its reasons and explanation in granting the remittitur.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because:

I.

Bodine's Petition presents issues which were not presented and ruled upon either by the District Court or the Circuit Court. The Courts of Appeals are not to be utilized as mere way stops on the road to the Supreme Court. Neither should this Court exist as an appellate court for resolution of issues waived in lower courts by failure to properly and timely assert them.

II.

Although waived, Bodine's claims that remittiturs are barred by the Seventh Amendment to the United States Constitution and that the granting of a remittitur violates the equal protection of the law are simply without merit.

All eleven Circuits have affirmed the validity of the practice of granting remittiturs under the Seventh Amendment, and this Court has given tacit approval of remittiturs in numerous decisions. Furthermore, for purposes of the Seventh Amendment, prior Circuit Court decisions and decisions of this Court have recognized the existence of precedent under English common-law before the adoption of the Seventh Amendment.

The equal protection claim is a frivolous complaint about the Federal requirement that there exist a final judgment before the right to appeal can be invoked. This rule is applicable to all litigants in Federal courts.

III.

Bodine's Petition simply refuses to acknowledge the stated factual basis in the Eleventh Circuit's opinion which, along with the record, wholly supports the remittitur in this case. The Eleventh Circuit granted the remittitur under appropriate standards of review advanced by Bodine himself.

Under the prevailing law of Florida applicable in this diversity action, Bodine was not entitled to any emotional distress damages, where there was no impact and/or the stress did not cause objective discernible physical impairment. Accordingly, he is in no position to complain about the remittitur.

Bodine's attempt to attack the remittitur at best presents a factual matter which should not concern this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE ISSUES SOUGHT TO BE RAISED HAVE BEEN WAIVED BY FAILURE TO PRESENT THEM IN THE LOWER COURTS.

While Bodine presents no basis whatsoever for the exercise of this Court's discretionary review, this Court has often stated that it will not review issues which were not properly presented to the lower courts, and which were not even raised or passed upon, including constitutional claims and allegations of a denial of a "constitutional right." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. _____, 106 L.Ed 2d 219, 239, 109 S.Ct. 2909 (1989); *United States v. Ortiz*, 422 U.S. 891, 898, 45 L.Ed 2d 623, 630, 95 S.Ct. 2585 (1975). As stated in *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed 996, 1100, 47 S.Ct. 566 (1926), involving a constitutional issue not asserted below:

> This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts of questions not addressed or passed on below or reviewed.

Here, not only did Bodine fail to raise any constitutional issues below, he also failed to seek rehearing of the remittitur in order to challenge, as he does here for the first time, the sufficiency of the Eleventh Circuit's explanation of the reasons for the remittitur.

The portions of his Brief directed to the remittitur are appended hereto. (RA. 16). Not only was there an absolute failure to raise any Seventh Amendment or other constitutional objections to the granting of the remittitur, Bodine's Brief admitted that a remittitur would be available if it is clear that the Jury's verdict was not supported by the evidence, citing: *e.g., Goldstein v. Manhattan Industries,* 758 F.2d 1435 (11th Cir. 1985), cert. denied 474 U.S. 1005, 88 L.Ed 2d 457, 106 S.Ct. 525 (1985); *Evers v. Equifax, Inc.,* 650 F.2d 793 (5th Cir. 1981); *Westbrook v. General Tire and Rubber Co.,* 754 F.2d 1233 (5th Cir. 1985).

II.

THE PETITION IN THIS CASE PRESENTS NO CREDIBLE CLAIM THAT THE GRANTING OF A REMITTITUR VIOLATES THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL OR THE EQUAL PROTECTION OF THE LAW.

Despite waiver of the issue, Bodine's claim that remittiturs are barred by the Seventh Amendment to the United States Constitution is without merit. Notwithstanding this Court's statement that it has never expressly held that the Seventh Amendment allows appellate review of a District Court's denial of a motion to set aside an award that is excessive, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. _____, 106 L.Ed 2d 219, 240 n. 25, 109 S.Ct. 2909, 2922 n. 25 (1989), this Court recognized in *Gruenthal v. Long Island Railroad Co.,* 393 U.S. 156, 157 n. 2, 21 L.Ed. 2d 309, 312 n. 3, 89 S.Ct. 331 (1968):

> 3. All 11 courts of appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive. *Boyle v. Bond,* 88 US App DC 178, 187

F.2d 362 (1951); *Compania Transatlantica Espanola, S.A. v. Melendez Torres,* 358 F.2d 209 (CA 1st Cir. 1966); *Dagnello v. Long Island R. Co.,* 289 F.2d 797 (CA 2d Cir. 1961); *Russell v. Monongahela R. Co.,* 262 F.2d 349, 352 (CA 3d Cir. 1958); *Virginia R. Co. v. Armentrout,* 166 F.2d 400 (CA 4th Cir. 1948); *Glazer v. Glazer,* 374 F.2d 390 (CA 5th Cir. 1967); *Gault v. Poor Sisters of St. Frances,* 375 F.2d 539, 547-548 (CA 6th Cir. 1967); *Bucher v. Krause,* 200 F.2d 576, 586-587 (CA 7th Cir. 1952); *Bankers Life & Cas. Co. v. Kirtley,* 307 F.2d 418 (CA 8th Cir. 1962); *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (CA 9th Cir. 1951); *Barnes v. Smith,* 305 F.2d 226, 288 (CA 10th Cir. 1962)

Furthermore, the validity of remittiturs under the Seventh Amendment has been given tacit, if not explicit, approval by decisions of this Court. This fact is rather exhaustively examined in *Dagnello v. Long Island Railroad Co.,* 289 F.2d 797, 800-805 (2nd Cir. 1961). 6A Moore's Federal Practice, 2 ed., § 58 [7], p. 59-189 n. 10, cites a selection of eight decisions where remittiturs have "...had the apparent approval of so many Supreme Court cases,..."

As further stated in *Gorsalitz v. Olin Mathieson Chemical Corporation,* 429 F.2d 1033, 1042-1043 (5th Cir. 1970), the recognition of the validity of the practice is ingrained in our judicial system:

> We agree with Professor Moore that the use of remittitur by federal district courts "has become so universal * * *, and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by Erie-Tompkins," 6A Moore's Federal Practice, 2nd ed., § 59.05 [3], pp. 3739, 3740 (footnotes omitted).
>
> The Supreme Court has repeatedly approved the practice. In *Northern Pacific R.R. Co. v. Herbert,* 1886, 116 U.S. 642, 646, 746, 6 S.Ct. 590, 29 L.Ed. 755, Justice Field speaking for the Court said:

> "2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand."

That holding and the remittitur practice were fully discussed by the elder Justice Harlan in *Arkansas Valley Land & Cattle Co. v. Mann,* 1889, 130 U.S. 69, 72-76, 9 S.Ct. 458, 32 L.Ed. 854, saying in part:

> "The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict where the damages are palpably or outrageously excessive."

130 U.S. at 74, 9 S.Ct. at 459. (footnote omitted).

As stated by Justice Stewart in his dissent in *Gruenthal, supra* 393 U.S. at 164, 21 L.Ed. 2d at 315-316:

> The Court professes not to consider the petitioner's argument that the Seventh Amendment and "the Federal Employers' Liability Act itself "prohibit judicial review of a district judge's order refusing to set aside a verdict as excessive. Yet by the very act of proceeding to review the district judge's order in this case, the Court necessarily, and I think quite correctly, completely rejects that argument. I fully agree with the Court and with the 11 courts of appeals that "nothing in the Seventh Amendment (or in the FELA) precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." (footnote omitted).

Notwithstanding at least tacit approval by this Court, the assertion that remittiturs are barred by the Seventh Amendment's prohibition of re-examining facts tried by a jury, "...otherwise ...than according to the rules of the common law," has no factual merit. As *Gorsalitz, supra* at 1043 and *Dagnello, supra* at 804-805 cogently point out, the English common law precedent for the practice was early recognized in *Dimick v. Schiedt,* 293 U.S. 474, 486, 79 L.Ed. 603, 611, 55 S.Ct. 296 (1935), as a "controlling distinction" between the remittiturs and additurs.

The majority opinion and Justice Stone's dissent in *Dimick,* joined by Chief Justice Hughes and Justices Brandies and Cardozo, concurred in the recognition of the uniform practice in England before the adoption of the Seventh Amendment. At common law, the practice was to apply not to the trial judge, but to the court en banc acting, effectively, as an appellate tribunal. 293 U.S. at 492 n. 2, 79 L.Ed. 2d at 614 n. 2. As stated in *Dagnello,* 289 F.2d at 804-805:

> Over a hundred years later the English precedents were studied with care. The fruits of this research appear in the majority and the dissenting opinions in *Dimick v. Schiedt, supra,* and in the dissenting opinions of Judge Holmes in the two Fifth Circuit decisions in *Sunray Oil Corp. v. Allbritton,* 1951, 187 F.2d 475, 477, and 1951, 188 F.2d 751, 752. The facts are simple enough, they were known all the time by legal scholars and students of procedure. Juries were regularly used in the courts of Kings Bench, Common Pleas and Exchequer. But motions for new trials were not addressed to the judges who presided over the trials. Instead, such motions were made at Westminster and heard en banc, by four of the judges, and the trial judge in a particular case might or might not be one of the four. There was no appeal on the point from the decision of the judges en banc. The historical evidence establishes beyond shadow of doubt that excessiveness in the amount of the verdict was commonly urged as a reason for the direction of a new trial, and many new trials were ordered for that reason alone. If it is deemed necessary to find English precedent prior to 1791 for appellate review of excessiveness, we think the practice

> at Westminster just referred to furnishes such precedent, as it was not the trial judge, but a group of judges sitting en banc and exercising functions analogous to those of an appellate tribunal, who determined the question of excessiveness. Nor does it appear that they found the question one of extraordinary difficulty. (Footnote omitted).

The final paragraph of the second argument of Bodine's Petition, at p. 5, attempts to inject an argument predicated upon a perceived equal protection violation, citing: *Donovan v. Penn Shipping Co.,* 429 U.S. 648, 51 L. Ed 2d 112, 97 S.Ct. 835 (1977)[3] and 2 Fed. Proc. L. Ed. Sec. 3:616.

Notwithstanding the fact that no such issue was raised below, and that it is not presented in the "Questions Presented" by Bodine's Petition, the equal protection argument is completely without merit. This Court's *Per Curiam* decision in *Donovan* applied the now settled rule that a plaintiff who has accepted a remittitur may not appeal. This settled rule poses no equal protection problem. If the remittitur is unacceptable to the plaintiff, he or she can appeal following the conclusion of the mandatory alternative of a new trial. Such plaintiffs are in no different position than any other litigant who must undergo a new trial and secure a final judgment before appealing the interlocutory order granting the new trial. *E.g.,* 6A Moore's Federal Practice, 2 ed., ¶ 59.15 [1], p. 59-294.

In essence, Bodine's equal protection argument is nothing more than a complaint about the "rule of finality" applicable to all litigants.

III.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF ABUSE OF DISCRETION AND FULLY AND ADEQUATELY EXPLAINED THE REASON FOR THE REMITTITUR.

3/ *Donovan* is another example of this Court's recognition of the power of Federal courts to grant remittiturs.

Bodine's Petition proceeds upon an erroneous factual premise which is advanced through the expediency of ignoring the whole of the Eleventh Circuit's opinion. (A. 9). There is no violation of *Gruenthal, supra.* The Petition carefully avoids even referencing the Eleventh Circuit's explanation of the reason why it granted the remittitur, which is fully supported by the record. (A. 9; quoted, in part, *supra,* p. 3).

As that portion of the opinion points out, the overwhelming evidence in the record, including Dr. Sprehe's testimony, established "...that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's delay in cancelling the policy." (A. 9). In addition to omitting reference to this stated reason, Bodine does not deny this fact.

Furthermore, it is apparent that the Eleventh Circuit applied the appropriate "abuse of discretion" standard with respect to the District Court's action in failing to grant a remittitur as referenced by its citation of *Glazer v. Glazer,* 278 F.Supp. 476 (E.D. La. 1968), and *Gorsalitz, supra.* Indeed, this was the very standard advanced by Bodine. (RA. 16). Bodine should not be heard to argue error in this Court when he has urged the very standard applied by the Circuit Court.

Bodine would have this Court overlook the fact that, at best, any negligence in failing to more promptly rescind the policy in order to remove the motive for the murder plot, as required by *Lopez,* lasted only from November 11, 1983, when Kemper first received some confirmation from the Federal authorities of a murder plot, until December 8, 1983 when the policy was rescinded. Manifestly, Kemper is responsible only for damages incurred because of its delay and not the murder plot itself.

Even considering the one instance of "throwing up" which occurred on November 7, 1987, together with the panic reaction Bodine felt when he found out from the December 2, 1983 letter that the policy had not yet been cancelled (but was cancelled on December 8), in light of the fact that he never experienced *any*

physical *impairment,*[4] and never visited a doctor until one year after the filing of the lawsuit, $1,000,000 under the remittitur is still an exorbitant amount.

The record further demonstrates that, at trial, the District Court expressed significant doubts concerning Dr. Sprehe's testimony as to causation with respect to the standard enunciated in *Brown v. Cadillac Motor Division, supra* n. 4. The following occurred at a bench conference overheard by Bodine, where Bodine's Counsel correctly related what Dr. Sprehe's testimony would be:

> MR. P. MARTIN: He is going to say that he observed, in talking about this particular situation, which he believes is attributable to this, that he observed that the witness would break down into a sweat right in front of him, a cold sweat, right in front of him, would physically start to sweat and start to fidget, right in front of him.
>
> THE COURT: I would suggest to you that it would stretch credibility to expect a fact finder to relate — causally relate that to an incident which occurred three or four years ago.

This conference occurred during the cross-examination of Bodine by Counsel for Kemper. Following the conference, for the first time in the litigation and in "response" to a question concerning his direct testimony, when he stated he *left* Yordan's house while Yordan called Kemper, Bodine injected the November 7, 1983 "throwing up" episode which allegedly occurred at Yordan's house.

4/ A fact ignored by the Eleventh Circuit's opinion. *See, Brown v. Cadillac Motor Division, supra,* p. 2 n. 2. Assuming, *arguendo,* the applicability of the modification of the impact rule in *Champion v. Gray, supra* p. 2 n. 2, the Eleventh Circuit's failure to specifically identify the undisputed character of Bodine's "injuries," which clearly do not meet the Florida standard ("psychological trauma must cause. . .discernible physical injury, such as death, paralysis, muscle impairment, or similar objectively discernible physical impairment before a cause of action may exist," *Brown, supra,* at 604), is certainly not a result of the lack of such evidence in the record. It is a product of the Circuit Court's ignoring the impact rule applicable to one in Bodine's position and which bars recovery of damages for purely emotional distress by one put in fear of his own life.

As stated by the Supreme Court of Florida in *Champion v. Gray,* 478 So.2d at 22:

> In this case we have emphasized that a physically traumatized person must manifest a discernible physical injury before that person has a claim resulting from *injuries inflicted on another.* A separate and distinct physical injury is required. We have specifically rejected purely emotional distress claims. *Brown v. Cadillac Motor Car Division,* 468 So.2d 903 (Fla. 1985). (Emphasis added).

The *Brown* "physical impairment" standard, announced in *Champion* and defined in *Brown,* and the other standards enunciated in *Champion,* are applicable as a relaxation of the impact rule *only* in situations involving emotional damages occasioned by injury to a close family member or one having a close relationship with the Plaintiff. They substitute for the continued requirement of "impact" with respect to emotional distress of a plaintiff put in fear of his own life, as was Bodine, *Sguros v. Biscayne Recreational Development Company* and *Champion, supra* p. 2 n. 2, because, as stated by the Florida Supreme Court in *Champion,* 478 So.2d at 20:

> . . . in our view it is necessary to curb the potential for fraudulent claims, and to place some boundaries on the indefinable and immeasurable psychic claims.

In this case, Bodine can hardly complain about a remittitur when he was not entitled to *any damages* for any of his psychic injuries.

In essence, with respect to the remittitur, Bodine's Petition presents arguments and assertions in a factual vacuum which ignores the stated basis for the Eleventh Circuit's action. This is obviously in the hope that this Court will become a Court to be utilized by litigants as but another tribunal to review the facts. Courts of appeals are not mere way stops on the road to this Court. This Court does not act as a mere appellate tribunal to review questions of fact of interest only to the parties themselves. *See*

e.g., NLRB v. Hendricks City Rural Electric Membership Corp., 454 U.S. 170, 176 n. 8, 70 L.Ed 2d 323, 330 n. 8, 102 S.Ct. 216 (1981); *United States v. Johnston,* 268 U.S. 220, 227, 69 L.Ed 925, 926 45 S.Ct. 96 (1925):

> We do not grant a certiorari to review evidence and discuss specific facts.

CONCLUSION

For the foregoing reasons, Bodine's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR FEDERAL
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COMPANY,
Respondent

NO. 90-1114

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent.

APPENDIX TO BRIEF IN OPPOSITION FOR RESPONDENT, FEDERAL KEMPER LIFE ASSURANCE COMPANY

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INDEX TO APPENDIX

Page

APPENDIX A - Order of The Honorable Elizabeth A. Kovachevich, Judge, United States District Court, Middle District of Florida, Granting Partial Summary Judgment A-1

APPENDIX B - Order of The Honorable Clarence C. Newcomer Visiting Judge, United States District Court, Middle District of Florida, Reinstating Claim For Negligent Infliction of Emotional Distress A-10

APPENDIX C - Portions of Bodine's Appellee's Brief .. A-16

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDMUND J. BODINE, JR.,

Plaintiff,

vs. **CASE NO. 85-1814-CIV-T-17**

FEDERAL KEMPER LIFE ASSURANCE CO., et al.,

Defendants.

ORDER ON MOTIONS

This cause is before the Court on Defendant Federal Kemper Life Assurance Company's (hereinafter Kemper) motion for summary judgment, Kemper's motion to strike portions of affidavit of Edmund Bodine, Plaintiff's motion for sanctions, and responses thereto.

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat v. The Miller Brewing Co.,* 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant,* 595 F.2d 994, 996-7 (5th Cir. 1979), quoting *Gross v. Southern Railroad Co.,* 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548, (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and

> on which that party will bear the burden of proof at trial. Id. at 273.

The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.' " *Celotex Corp.,* at p. 274.

On August 20, 1986, Plaintiff filed an third amended complaint (hereinafter complaint). Count II of the complaint was directed at Defendant Kemper and states the following (paragraph numbers are cited as they appear in the complaint):

> 12. On or about July 18, 1982, a policy of insurance in the amount of Two Million Dollars ($2,000,000.00) was issued by Defendant, KEMKER, upon the life of EDMUND J. BODINE, JR., Policy Number FK1309281.
>
> 13. Defendant, KEMKER, was negligent and careless in their conduct regarding Policy Number FK1309281 in one or more of the following ways:
>
> A. In issuing a policy of life insurance with such a large face value without adequately and properly investigating the insured and the beneficiary thereto, nor the circumstances surrounding such application for insurance, thereby exposing the insured to foreseeable danger from the beneficiary to the said policy.
>
> B. In issuing a policy of life insurance wherein the only beneficiary was an entity which had no relationship nor insurable interest therein (i.e. Cayman Films, Ltd.) without adequately and properly investigating the circumstances behind such application for insurance.
>
> C. In failing to discover the existence of such conditions following the issuance of the insurance contract in a reasonable and timely fashion after negligently and carelessly permitting such conditions to exist.

D. In failing to cancel the aforementioned policy of insurance after they had received actual verbal and written notification of the beneficiary's murderous intent in derogation of the well-being of the insured.

E. In failing to properly and adequately investigate the facts concerning the welfare and well-being of the insured following their receipt of actual notice of the circumstances aforementioned; and

F. In failing to discover the aforementioned facts in a reasonable and timely fashion after issuing the said policy of insurance.

14. Despite receiving direct communication and actual and express notice of the murderous intent to the life of the insured under Policy Number FK1309281 by the policy beneficiary, Defendant, KEMPER, willfully, wantonly, maliciously, callously and with complete disregard for the rights and well-being of their insured, and despite an express duty to this policy insured, did refuse to withdraw and cancel said policy of insurance, thereby deliberately exposing EDMUND J. BODINE, JR., to continued violence and threats of death as aforesaid.

15. As a direct and proximate cause of the willfully malicious conduct of Defendant, KEMPER, EDMUND J. BODINE, JR., has suffered severe trauma, physical and emotional. He has been prevented from the completion of several business ventures and has incurred losses therein. Plaintiff has been further exposed to false and libelous accusations, has been prevented from leading a normal lifestyle and has been forced to secret himself and isolate himself from friends, relations, business associates and others with whom he might ordinarily associate with upon a daily basis.

WHEREFORE, the Plaintiff, EDMUND J. BODINE, JR., demands judgment for compensatory damages and punitive damages in the amount of ONE HUNDRED MILLION DOLLARS ($100,000,000.00) against Defendant, KEMKER, and further demands trial by

jury of all issues triable as of right by jury.

The first question the Court must address is what, if any, duty Defendant Kemper owed to Plaintiff in this instance to protect Plaintiff or to investigate prior to issuing the policy in question. The Court has found several limited instances where the law places a duty on an insurance company to protect its insured. "The only duty the law imposes on an insurance company to protect its insured is that the company take reasonable steps to determine whether the insured has consented to the policy or the change in beneficiary or should have known that the person procuring the policy did not have an insurable interest in the insured's life." *Bacon v. Federal Kemper Life Assurance Co.,* 512 N.E.2d 941 (Mass. 1987).

There are several instances where an insurance company has been found liable for harm to an insured, the facts of those cases limit the liability to a handful of circumstances. In *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983), the insured claim he had not consented to the issuance of the policy (he claimed he had been tricked by his wife, that he called the insurance company and told them of the danger to his life and that they failed to investigate. The court answered, in the affirmative, the following certified question:

> Whether an insured issuing an insurance policy can be liable in tort to the insured where the policy beneficiary attempts to murder the insured in order to collect the policy benmefits and where the insurer had actual notice of the policy beneficiary's murderous intent. *Id.,* at 948.

The Court stated that insurance companies generally cannot be held to be "guarantors" of the good intentions of their customers, but, neither, can they be relieved of a duty to investigate when a beneficiary's criminal motive is made known to them. *Id.,* at 949.

A second relevant case is *Liberty National Life Insurance Co. v. Weldon,* 100 So.2d 696 (Ala. 1957). In *Weldon,* the father of the insured sued for wrongful death of the insured resulting from the alleged negligence of the insurers in issuing policies on the child's life to an aunt with no insurable interest, where the insurance agents were aware of the lack of insurable interest, and where the aunt subsequently murdered the child. The court found, in these circumstances, the question of negligence to be a jury issue.

In *Ramey v. Carolina Life Insurance Co.,* 135 S.E.2d 362 (S.C. 1964), the plaintiff alleged that the signatures on the application and inspection for life insurance forms were forgeries and were known by the defendant to be forgeries, but that the defendant issued the policy despite the knowledge that the plaintiff did not consent to the policy. The court, adopting the order of the circuit judge, found a clear distinction between cases where the "policy is procured by the insured bona fide on his own motion and cases in which it is procured by another. It is a very different thing for a man to create voluntarily an interest in his termination and to allow some one else to do so at their will." *Id.,* at 364-65.

The three situations which courts have held create a cause of action against the insurer for the issuance of a policy of life insurance, which results in danger to the life of the insured, may be summarized as follows:

> 1. Where the insurer has actual knowledge of threats on the life of the insured, the insurer fails to investigate the allegations of danger to the insured, and fails to rescind the policy, a *Lopez* situation;
>
> 2. Where there is no insurable interest in the named insured by the beneficiary and the insurer knew, or should have known, of the lack of insurable interest, a *Weldon* situation; and
>
> 3. Where the insurer knew, or should have known, of the forgery of the insured's signature on the policy application.

The Court first addresses the allegations of the complaint pertaining to the issuance of the life insurance policy on Plaintiff in or about July 18, 1982. (Paragraph 13, subparagraphs A, B, C, and F of Count II of the third amended complaint. The Court, upon due consideration, finds that the facts as alleged herein do not meet the criteria for finding liability against Defendant for the issuance of the life insurance policy.

In this case, Plaintiff meet with Kemper agent Robert Hiatt in Salt Lake City, Utah for the purposes of obtaining key man insurance for himself and three others. Plaintiff signed the application for insurance and subsequently submitted himself for the required physical examination in pursuit of the policy. There are no allegations in this case of forgery, that the insurer had any

reason to be aware that the beneficiary of the policy might not have an insurable interest, or that at the time of the issuance of the policy the insurer knew or should have known of any threats to the life of Plaintiff or any other insured.

The Court finds that there is no issue of material fact as to whether Defendant Kemper breached any duty to Plaintiff as to the issuance of the insurance policy. The Court finds that the motion for summary judgment should be **granted** as to Paragraph 13, sub-paragraphs A, B, C, and, F of Count II of the third amended complaint.

It is not entirely clear from the memorandum in support of the motion for summary judgment whether or not Defendant Kemper seek summary judgment as to Paragraph 13, sub-paragraphs D and E of Count II, relating to the alleged negligent failure to cancel the policy following notification of the death threats. Assuming Defendant seeks summary judgment of all issues, the Court has reviewed that issue as to whether or not summary judgment is appropriate.

At some point in time, approximately November of 1983, Defendant Kemper was notified by Plaintiff and another insured, Phillip Yordan, that there were death threats against their lives. The two men requested that the life insurance policies be cancelled. Defendant Kemper alleges that they reasonably undertook to investigate the allegations presented to them regarding death threats and when they had sufficient evidence of the existence of the threats they cancelled the policies, without having the permission of the owner of the policy. As stated previously, when an insurer has notice of threats against an insured's life it has a duty to investigate and to cancel the policy if appropriate. *Lopez*, 448 So.2d 947.

The Court finds that the issue regarding the claim of negligence in not cancelling the policy after notification of the death threats does present a genuine issue of material fact. The question for the jury will be whether or not the investigation, the time it took to conduct and the handling of it, satisfied Defendant's duty pursuant to case law. The Court cannot find as a matter of law, based on the record presented herein, that the duty was met and that there is no genuine issue of negligence. The motion for summary judgment as to this issue should be **denied.**

Paragraph 13, subparagraphs D and E, and Paragraph 14, Count II of the third amended complaint, asserts that the failure of Defendant Kemper to immediately cancel the life policies was willful, wanton, malicious, etc., thus entitling it to punitive damages.

The parties agree that the standard for awarding punitive damages is "an intentional wrong that amount[s] to an independent tort, . . . the entire want of care or attention to duty that would allow a jury to impute malice . . ." *Nicklaus v. Miami Burglar Alarm Co., Inc.,* 339 So.2d 175, 177-78 (Fla. 1976; *American International Land Corp. v. Hanna,* 323 So.2d 567 (Fla. 1975).

The Court, having reviewed the record and upon due consideration, finds that Plaintiff has failed to establish a genuine issue of fact as to the issue of entitlement to punitive damages. There is nothing in the record to support the punitive damage claim. The record shows that Defendant Kemper undertook to investigate the allegations of death threats upon receipt of notice from Plaintiff. The Court adopts Defendant Kemper's recitation of these facts which appear at pages 18 through 21 of its memorandum in support of the motion for summary judgment.

Plaintiff has failed to come forward with any evidence in support of the opposition to the motion for summary judgment which support any finding of willful, malicious, wanton disregard of their duty against Defendant Kemper. The motion for summary judgment as to the claim for punitive damages should be **granted.**

The State of Florida recognizes the tort of intentional infliction of emotional distress. The threshold test in assessing a claim for this tort is whether

> . . . such behavior is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." In applying the standard, it is manifest that the subjective response of the person who is the target of the actor's conduct is not to control the question of whether the tort occurred. Rather, an evaluation of the claimed misconduct must be undertaken to determine, as objectively as is possible, whether it is "atrocious, and utterly intolerable in a civilized community." (cite omitted) That burden falls to the judiciary—it is a matter of law, not a question

> of fact. (cite omitted) The deportment described in the pleaded facts with which we are concerned, condemnable by civilized social standards, does not ascend, or perhaps descend, to a level permitting us to say that the benchmarks enunciated in *Metropolitan* have been met.

Ponton v. Scarfone, 468 So.2d 1009, 1011 (Fla. 2d D.C.A. 1985); *Metropolitan Life Ins. Co. v. McCarson,* 467 So.2d 277 (Fla. 1985).

The Court has assessed the allegations made against Defendant Kemper to determine as a matter of law whether the allegations, as supplemented by the affidavits and depositions, support Plaintiff's claim of intentional infliction of emotional distress. Upon due consideration, the Court is satisfied that the allegations and supplemental evidence cannot sustain the claim. The alletations fall far short of behavior which is "beyond all possible bounds of decency." The motion for summary judgment should be **granted** as to the claims for intentional infliction of emotional distress.

The final issue of the motion for summary judgment is whether the is a genuine issue of material fact as to any claim for negligent infliction of emotional damages. Florida recognizes this cause of action where a person suffers a significant discernible physical injury resulting from psychic trauma caused by negligence. *In re Eastern Airlines, Inc., Engine Failure,* 629 F.Supp. 307 (S.D. Fla. 1986); *Champion v Gray,* 478 So.2d 17 (Fla. 1985).

Plaintiff has the burden of establishing the existence of physical injury in order to be entitled to damages for negligent infliction of emotional damages, and, therefore, must by affidavits, depositions, etc. establish a genuine issue of material fact exists of that claim. *Celotex Corp.,* 477 U.S. at 274. All we have in this cause is Plaintiff's statement that he has suffered "physical trauma" (Paragraph 15, third amended complaint) and "physical distress" (answer to interrogatories attached to Defendant's memorandum in support of motion for summary judgment). Plaintiff has failed to go beyond the conclusory allegations of the complaint to establish there exists a genuine issue of material fact on this claim. Accordingly, it is

ORDERED that the motion for summary judgment be **granted** and the following claims of the third amended complaint be **dismissed:** Paragraph 13, subparagraphs A, B, C, and F, of

Count II, the claim for punitive damages, the claim for intentional infliction of emotional distress, and the claim for negligent infliction of emotional distress. There remains pending in this cause the issue of negligent failure to cancel the insurance policy, following notification of the existence of death threats, for approximately one month.

DONE and ORDERED in Chambers, in Tampa, Florida this 23rd day of January, 1989.

/s/ Elizabeth A. Kovachevich

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDMUND J. BODINE, JR.,

Plaintiff,

v. **CASE NO: 85-1814-Civ-T-17**

FEDERAL KEMPER LIFE ASSURANCE COMPANY, et al.

Defendants,

M E M O R A N D U M

This is a state cause of action in diversity pursuant to the recently recognized tort of negligent failure of an insurance company to cancel a life insurance policy following notice of a plot to kill the insured. Before me now is defendant's Motion in Limine to Exclude Evidence of Plaintiff's Damages. For the rational which follows I will deny defendant's motion.

Background.

The facts for the purpose of the motion before me now are relatively simple. Plaintiff, Edmund Bodine, was a partner in a motion picture production venture. In July, 1982, Key Men Life Insurance policies were obtained in the amount of approximately $2,000,000.00 for each partner in the venture.

United States government agents informed Bodine in October, 1983, that a person or persons had been hired to kill him. Bodine, after some investigation of his own, determined that the plot to kill him was an effort by one of his business partners to collect on the Key Man Insurance policy benefits. Bodine naturally enough called defendant, Federal Kemper Life Assurance Company, to demand that the policy be immediately cancelled.

Plaintiff alleges that for reasons due to the negligence of defendant, the policy was not cancelled until approximately 30 days later. Plaintiff asserts damage for physical, financial, and

psychological injuries suffered as a result of the emotional distress he experienced during this 30 day waiting period. It is the issue of plaintiff's legal right to collect these damages which is the focus of defendant's motion.

Discussion.

As a federal court sitting in diversity I must apply the law of the forum state. *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938). However, when the state courts have not spoken as to a particular issue, the federal court must predict how the state's Supreme court would rule when faced with that issue. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 457 (1967); *Delduca v. United States Fidelity & Guaranty Company,* 357 F.2d 204 (5th Cir. 1966). While a federal court is not free to follow its own inclinations in such matters, I must be sensitive to the doctrinal trends of the state of Florida whose law I am to apply in this case. *See Morton v. Abbatt Laboratories,* 538 F.Supp. 593 (M.D. Fla. 1982) (If no state precedent, federal court sitting in diversity should look for indicators as to how state Supreme Court would rule); *See also Becker vs. Interstate Properties,* 569 F.2d 1203, 1206 (3d Cir. 1977), cert. den. Interstate Properties v. Becker, 431 U.S. 906 (1978).

Previously, this Court granted summary judgment in favor of defendant on all counts alleged except for the cause for "negligent failure to cancel the insurance policy, following notification of the evidence of death threats. . ." *Bodine v. Federal Kemper Life Assurance Company,* No. 85-1814-CIV-T-17, slip. op. at 11 (M.D. Fla., Jan. 23, 1989)[1] Defendant's motion before me now asks this Court to effectively deny Plaintiff the right to recover damages on this claim.

The tort of the negligent failure of an insurance company to cancel a life insurance policy when it is aware of a death threat against the insured has only recently been recognized by Florida Courts. *See Lopez v. Life Insurance Company of America,* 406 So.2d 1155 (Fla. 4th DCA, 1981), *affirmed* 433 So.2d 947 (Fla. 1983).

---

1. Summary Judgment was entered prior to the time this case was reassigned to my docket for trial. In addressing this Motion in Limine I need not apply the summary judgment standards. For the purposes of this motion I am limited solely to the technical issue of damages pursuant to this cause of action.

The Court in *Lopez* sidestepped the question of any limitation on damages resulting from a purely psychological injury as a result of the new tort. The Court stated,

> [A]ppellee relies on *Claycomb v. Eichles*... for the proposition that damages may not be recovered for mental anguish or physical injury resulting from emotional stress which is caused by negligence where there is no physical impact. We neither subscribe to nor repudiate that proposition here.

Lopez, 406 So.2d at 1160. The Court went on to state the issue was moot because there was physical impact in *Lopez*. Defendant, in the instant case, argues that the lack of physical impact precludes evidence of substantially all of plaintiff's claimed damages. I disagree.

Defendant's argument is founded in the general rule applied by Florida Courts regarding emotional stress in negligence case. The Court in *Claycomb v. Eichles*, 399 So.2d 1050 (Fla. 2dDCA, 1981), stated this rule:

> The rule in Florida is that damages may not be recovered for mental anguish or physical injury resulting from emotional stress caused by the negligence of another, in the absence of a physical impact upon the plaintiff.

Id. at 1051.

The Florida Supreme Court has expressed the rule similarly. The "circumstances under which one may recover for emotional or mental injuries, is when there has been a physical impact or when they are produced as a result" of an intentional tort to cause emotional distress. *Gilliam v. Stewart*, 291 So.2d 593, 595 (Fla. 1974). *See also Steiner and Munach, P.A. vs. Williams*, 334 So.2d 39 (3d DCA, Fla. 1976), *cert. den.* 345 So.2d 429 (Fla. 1977).

In 1985, the Florida Supreme Court modified the "impact rule" for cases of negligent infliction of emotional harm where the plaintiff witnesses an injury to another and suffers some emotional harm. The Supreme Court held:

> that a claim exists for damages flowing from a significant discernable physical injury when such injury

> is caused by psychic trauma resulting from negligent injury imposed to another who, because of his relationship to the injured party and his involvement in the event causing the injury is foreseeably injured.

Champion v. Gray, 478 So.2d 17, 20 (Fla. 1985). *See also Ledford v. Delta Airlines, Inc.,* 658 F. Supp. 540 (S.D. Fla. 1987).

Although this modified "impact rule" does not apply to the cause of action before me now, it does indicate that the Florida Supreme Court has found equitable reason to depart from the rule under certain circumstances. Therefore, in order to predict how the Florida Supreme Court would apply the "impact rule" for the tort of the negligent failure to cancel a life insurance policy, I must examine the policies expressed by the Florida courts as to the "impact rule."

The Florida Supreme Court in *Champion* stated the policy behind the impact rule:

> The impact doctrine gives practical recognition to the thought that not every injury which one person may, by his negligence, inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Champion, 478 So.2d at 18, *citing Gilliam, supra,* 271 So.2d at 477. In other words, the "impact rule" is to provide a "threshold indicator" of significant injury so the courts may feel satisfied that an emotional distress-based injury has actually occurred.

The *Champion* Court determined that this "threshold indicator" is not necessary when a "discernable physical injury (is) caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact . . ." *Id.* at 18. The Court did note, however, that there is still the requirement that the plaintiff suffer a "causally connected clearly discernable physical impairment (which) must accompany or occur within a short time of the psychic injury." *Id.*

The Supreme Court was aware that it had created a new tort

in its affirmance of the lower court *Lopez* decision. *Lopez,* 443 So.2d at 949. It is a negligence case of action unlike all others. The insurance company, in the proper circumstances is held to have a duty to act to deter the death threat:

> Such...circumstances must surely impose on the insurance company a duty to eliminate any motive for effecting the insured's death if not by withdrawing the coverage...then at least by warning the beneficiary that no proceeds would be payable if she in fact murdered the insured. Knowledge that the insurance company was aware of the plot and would scrutinize the insured's "accidental" death would *surely serve as a deterrent* to the accomplishment of the evil purpose.

Id. [emphasis added].

Logically, the "impact" which is likely is not caused by the tortfeasor under the new *Lopez* tort. The only impact which is possible is, as in *Lopez,* where the death threat is actually carried out or is in the process of being carried out. The impact is not created by the actions of the defendant insurance company, but rather flows indirectly from the failure to cancel the policy thus leaving reason for the murder, the insurance benefits, as a viable option for the murderers to pursue. The possible impact is one over which defendant has little direct control; it is, rather, an event almost entirely in the hands of a third party, save for defendant's duty to act to deter the event.

I conclude that the Florida Supreme Court would not find that the "impact rule" would create any principled "threshold" of injury that would separate meritorious claims from those which are not meritorious. The doctrinal trend in Florida, as evidence by the Supreme Court's decision in *Champion,* is to a relaxation of the "impact rule" in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress-related injury. It is clear from *Lopez* that the Florida Supreme Court believes that those injured by the negligence of the insurance companies in cases such as this one should be compensated. As in the scenario in *Champion,* the Court believes that the harm is "too great to require direct physical contact." There may be no emotional distress greater than the fear that one's life is constantly in danger from an unknown assailant. Therefore I conclude that the application of the "impact rule" would create the type of unprincipled threhold which the Supreme Court sought

to avoid in *Champion,* and would nearly eradicate the recovery under the cause of action it purposefully created.

I would emphasize that plaintiff still has the burden at trial to prove that his injuries were causally connected to defendant's action and that a clearly discernable physical injury or manifestation occurred within a short time of the psychological injury. *See Champion,* at 19. Physical impact is different from a physical manifestation of the distress-induced injury. The *Champion* court clearly indicated that a claim for emotional distress must be accompanied by a physical manifestation of the emotional injry absent impact. *Id. See also Eagle-Pitcher Industries, Inc. v. Cox,* 481 So.2d 517 (3d DCA), *review denied* 492 So.2d 1331 (Fla. 1985). The physical manifestation requirement is a much more principled manner in which to discern the severity of the mental distress of a plaintiff.

The Court is not unaware that plaintiff may have an uphill battle in proving that certain items of his damages were proximately caused by defendant's actions. There may also be a legitimate issue as to the foreseeability of some of plaintiff's alleged injuries. However, at this stage of the case, given the legal implications of this decision, these issues are more properly questions of fact for the jury or the subject of mid-trial motion for directed verdict.

I will deny the defendant's Motion in Limine in an appropriate Order which follows.

/s/ Clarence C. Newcomer, Jr.

Clarence C. Newcomer, J.

APPENDIX C

SUMMARY OF ARGUMENT

* * *

III. The jury award for pain and suffering and economic loss in this case was reasonable and consistent with the testimony and evidence. The Court may not substitute its opinion for that of the trier of fact absent a showing of a clear abuse of the jury's discretion. *Westbrook v. General Tire and Rubber Company,* 754 F.2d 1233, 1241 (5th Cir. 1985).

STANDARDS AND SCOPE OF REVIEW

* * *

Remittitur is appropriate only if the jury verdict is so large as to be contrary to right reason and there is a clear showing of abuse or passion or prejudice, but only where the verdict is so excessive as to shock the conscience of the Court. *Westbrook, supra,* at p. 1241; *Goldstein v. Manhattan Industries,* 758 F.2d 1447 (11th Cir. 1985), *cert. denied,* 474 U.S. 1005 (1985); *Hendrick v. Hercules, Inc.,* 658 F.2d 1088, 1095 (5th Cir. 1981).

ARGUMENT

* * *

III.

REMITTITUR IS IMPROPER UNLESS THE JURY AWARD EXCEEDS THE AMOUNT ESTABLISHED BY THE EVIDENCE.

Aside from Federal Kemper's meritless argument regarding a lack of a standard of care, it is clear that the jury fully and finally determined that Federal Kemper was liable for its actions in failing to cancel the policy of life insurance.

If this Court is satisfied that the verdict established the liability of Federal Kemper, then remittitur is only available if it is clear that the jury verdict was affected by improper considerations or was not supported by the evidence. *Goldstein v. Manhattan Industries,* 758 F.2d 1435 (11th Cir. 1985), *cert. denied,*

474 U.S. 1005 (1985); *Evers v. Equifax, Inc.,* 650 F.2d 793 (5th Cir. 1981). *Westbrook v. General Tire & Rubber Company,* 754 F.2d 1233 (5th Cir. 1985). The trial judge who refused to grant a new trial herein who, with the benefit of his participation at trial, his observation of the witnesses, and his understanding of the case, has found these elements present; it is not the province of the appellate court to second-guess his determination. See: *Edwards, supra* p. 281; *Hedrick,* p. 1095.

The testimony and evidence adduced at trial provide a sufficient basis for the jury award in this case. See *Goldstein, supra* p. 1448.

Federal Kemper's argument, moreover, with respect to a limitation of damages for pain and suffering to $750,000.00 is without merit. Fed. R. Civ. P. 16 (e) should be construed liberally. *Eagle v. American Tel. & Tel. Co.,* 679 F.2d 541 (9th Cir. 1985), *cert. denied,* 475 U.S. 1084, 106 S.Ct. 1465, 89 L. Ed. 2d 721 (1986).

Damages for pain and suffering are intangible and are purely discretionary with the trier of fact and cannot be limited unless a clear abuse of discretion is shown. Moreover, no new theory of relief not pled by Bodine was revealed at trial with respect to 841 F.2d 918 (9th Cir. 1988). Rather, a higher award by the jury is "implicitly included" in the Pretrial Order. See: *Eagle, supra* p. 548.